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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

VS.

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improperly sanctioned the trial court's departure from the accepted and usual course of judicial proceedings by investing the jury with judicial power to resolve fact and law and to dispose of three totally diverse claims by its answer to one special interrogatory related to one claim only; and by such appellate sanction denied petitioners their constitutional rights to a trial by jury and due process on two claims asserted by them.

2. Whether the federal Employees Retirement Income Security Act (29 U.S.C.S. Sections 1104(a) and 1106(b)(2) prohibits a majority of trustees of a profit-sharing trust from amending trust agreements to invest the same majority trustees with preferred rights to compete with the funding employer company free of binding benefit forfeiture under the trust agreement, rights preferred and reserved to these trustees alone and rights the exercise of which would discriminate against the benefit interests of the remaining employee beneficiaries.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners here were the defendant-counterplaintiffs below; they are: Arthur Pielet, James Pielet, and Robert Pielet, individually and as Trustees of the Pielet Bros. Employees' Profit-Sharing Plan and Joliet Railway Employees' Profit-Sharing Plan, Pielet Bros. Scrap Iron & Metal, Inc. and Joliet Railway Equipment Co.

The respondents here were the plaintiff-counterdefendants below; they are: Seymour Pielet, Samuel Pielet, and Irving Pielet.

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II.

The Federal Employees Retirement Income Security Act (29 U.S.C.S. Sections 1104(a) And 1106(b)(2) Prohibits A Majority Of Trustees Of A Profit-Sharing Trust From Amending Trust Agreements To Invest The Same Majority Trustees With Preferred Rights To Compete With The Funding Employer Company Free Of Binding Benefit Forfeiture Under The Trust Agreement, Rights Preferred And Reserved To These Trustees Alone And Rights The Exercise Of Which Would Discriminate Against The Benefit Interests Of The Remaining Employee Beneficiaries 14

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In The

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October Term, 1982

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The Seventh Circuit Court of Appeals held that the trial court properly bifurcated each of three diverse principal claims upon one special interrogatory and properly accepted the jury's response as completely dispositive of each of said claims.

The court failed to consider whether Sections 1104(a) and 1106(b)(2) of the Employees Retirement Income Security Act of the United States prohibited majority trustees of an employees' profit-sharing trust from amending the trust agreement to invest themselves with the right to compete with the funding employer company free of benefit forfeiture otherwise applicable to them and the remaining employee-beneficiaries under the binding terms of the trust agreement. (A copy of the opinion is attached as Appendix A.)

JURISDICTION

The Court of Appeals' decision was rendered on August 12, 1982. A Petition for Rehearing was denied September 8, 1982. This petition is being filed within ninety days of the date the Court of Appeals denied the Petition for Rehearing as per 28 U.S.C.S., Sec. 2102(c). This Court's jurisdiction is invoked under 28 U.S.C.S., Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments V, VII, and XIV of the Constitution of the United States and federal Employees Retirement Income Security Act, 29 U.S.C.S., Sections 1104(a) and 1106(b)(2).

STATEMENT OF THE CASE

The case proceeded to trial on April 20, 1981 upon respondents' claim to profit-sharing benefits based upon existing written profit-sharing agreement authored by said respondents as a majority of the plan trustees. The cause also proceeded to trial upon petitioners' claims to damages and injunctive relief. Petitioners' claims were based upon violations of a written employment contract which forbade respondents' competition and upon tort principles which forbade their unfair competition.

Evidence was taken on each of the claims. The uncontested facts were:

1. The respondents competed with the host companies for many years.

2. The respondents in competing with the funding companies pirated ten key employees of Pielet Bros.; twenty-five substantial customers, and virtually the identical name—Pielet Bros. Trading, Inc.

3. The employee profit-sharing agreements provided for benefit forfeiture where beneficiaries competed with the funding company in the same line of business.

4. The respondents were three of five plan trustees who devised and adopted the plan agreements in 1967 and 1969.

5. The respondents were three of five plan trustees who on March 22, 1975, as the trial court and jury found, amended the plan agreements by the employment agreements of the same date to give each of the three trustees the right to compete with this company free of benefit forfeiture otherwise applicable to them and the remaining hundreds of employees.

At the close of respondents' evidence and, again, at the close of all evidence, petitioners moved for directed find-

ings on each of their two claims and against respondents on their claim to profit-sharing benefits.

Petitioners' Motion for Judgment Non Obstante Veredicto Or For A New Trial was also denied.

Petitioners were denied their motions as counterplaintiffs and defendants for directed findings at the close of all evidence and earlier at the close of the evidence of petitioners and respondents on issues involving:

1) forbidden competition forbidden to respondents by the employment agreements of March 22, 1975; and

2) unfair competition with Pielet Bros. forbidden to respondents by principles of tort; and

3) profit-sharing benefits forfeited to respondents for their competition with the host employer.

On April 28, 1981, the jury returned its verdict. It answered "no" to the following single, special interrogatory:

> "In using the language 'employee shall not own, operate, or participate in the ownership or operation of a scrap yard or shredder,' in paragraph 7 of the employment agreements, did the parties intend to prohibit Seymour, Samuel, and Irving Pielet from buying and selling scrap metal within 100 miles of the City of Chicago?"

Petitioners renewed their written motions for favorable judgments when the court entered judgment for the respondents on the jury's verdict.

In 1967 and 1969, Pielet Bros.* and Joliet Railway* adopted and executed two trust agreements to govern the

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* Each a petitioner:

Pielet Bros. Scrap Iron & Metal, Inc. is abbreviated to Pielet Bros.

Joliet Railway Equipment Co. is abbreviated to Joliet Railway.

profit-sharing rights and benefits of their employees, including each of the three respondents who were then majority stock owners of Pielet Bros. and Joliet Railway and also majority trustees of the trust fund and trust agreement.

The plan agreements were organized and drafted under the supervision of attorney Herbert Olfson, an attorney selected by the three respondents as "majority trustees" and signed by each as trustee. Later amendments, some six in number, each designated "Amendment" were separately signed by each of the respondents as trustee and separately prepared under the supervision of attorney, Herbert Olfson.

On March 22, 1975, the same three respondents, still the majority company owners and the majority trustees of the profit-sharing fund and trust agreement, executed two year employment agreements with Pielet Bros. and Joliet Railway. The court and jury found these agreements to have amended the profit-sharing agreements to confer rights of competition upon the respondents free of benefit forfeiture mandated by the plan agreements.

The profit-sharing agreements, without exceptions, exclusions, or difference, provided that an employee would be subject to discharge for cause "for actively engaging in or working for a business in direct competition with an employer while employed by an employer * * *," and, further, that for such competition, "shall not be entitled to any portion of the amount of his account attributable to Employer Contributions."

Each plan also provided that:

> "No person shall have any interest in any claim upon the fund or any part thereof except as expressly provided in the Plan * * *." (Sec. 13.01 and 15.01.)

Shortly after March 22, 1976, after selling out to their brother, Arthur Pielet and while engaged as employees of Pielet Bros. and Joliet Railway, respondents competed with Pielet Bros. and Joliet Railway by buying and selling scrap metal and operating from principal business offices in greater metropolitan Chicago. This fact of competition is admitted.

For this competition, respondents were discharged.

On June 30, 1976 Seymour, Samuel, and Irving Pielet were notified in writing of their discharges and of their removal as profit-sharing trustees for engaging in competition with Pielet Bros. Additional reasons were given; they included charges of unfair competition, raids upon key employees, and misappropriation of Pielet's business name, all taking place immediately after March 22, 1975 when Seymour, Samuel, and Irving Pielet, for more than twenty-five years majority stock owners of Pielet Bros. and Joliet Railway, sold out to Arthur Pielet.

Shortly before the March 22, 1975 sale, Seymour, Samuel, and Irving, and Arthur considered adding a new business site to the Pielet business, the site to be located in southern Illinois. The additional site was to be acquired for the purpose of utilizing some unused, valuable automobile shredding and other machinery and equipment.

Seymour, Samuel, and Irving Pielet explored, located, and acquired for themselves the southern Illinois site at National City on March 25, 1975, one business day after the Pielet-Joliet sale of March 22, 1975. Arthur Pielet was never notified of the site selection or its purchase by Seymour, Samuel, and Irving. On the same March 25, 1975, they also acquired a full range of business, building and zoning permits, all acquired without municipal hearings or municipal or other government sanctions.

The National Stockyards of National City, Illinois, a private party, issued the business, building, and zoning permits.

It was only a few days before their National City acquisition of March 25, 1975 that the respondents initiated buy-out negotiations with Arthur Pielet. On Thursday, March 20, 1975, "at the telephone request of Seymour Pielet, Arthur Pielet met with Seymour, Samuel, and Irving Pielet at the Argo-Summit" plant.

Meanwhile, on March 20, 1975, Irving Pielet telephoned attorney Herbert Olfson to come out and "discuss the transaction." Olfson testified he knew "instantly that he was going to represent him [Irving] and not his brother, Arthur." He said that he "decided in my own mind that I was representing Irving; as I was representing Irving, Seymour, and Samuel, I did not believe that I could also represent Arthur." He testified that "he hopped to it." He went right out there that afternoon to discuss a transaction in which Arthur Pielet was going to purchase the stock interests of the other three brothers. Olfson had for many years before represented the entire Pielet family and the Pielet corporations, including brothers Arthur and Philip, who had died in 1974.

Soon after the Olfson arrival during the afternoon of March 20, 1975, Olfson told Arthur to "get yourself somebody else to represent you"; that he was "representing Irving and the others." He "urged him to get another attorney." He added that Seymour Pielet then said "we haven't got the time to get another attorney for him [Arthur]."

Olfson further testified that he did not tell Arthur that since a $10,000,000 deal was involved that he "was not going ahead with it until you [Arthur] get somebody to

represent you." Olfson failed to inform Arthur of the risks or dangers he faced in a large stock transaction of this size and kind.

Olfson and Blust proceeded with the negotiations and prepared the "necessary papers to effectuate the earlier oral agreement." They never prepared a written agreement or any writing or writings to reflect the terms of the sale; nothing to express either the buyer's obligation to buy or the sellers' obligation to sell; nothing of warranties or representations respecting stock ownership or of liens or liabilities, and nothing of pending or threatened litigation, taxes, indemnification, guarantees, etc. They did prepare three written employment agreements with Pielet Bros., one for each of the respondents. Each was provided with almost two years of employment at an average annual salary of $100,000 and two additional years of profit-sharing valued at approximately $200,000. They drafted a six month option agreement that required Arthur Pielet to deliver itemized auto shredder parts and other machinery and equipment to the newly acquired National City plant of the respondents and an agreement that cancelled the Pielet Bros. buy-sell stock agreement enabling Seymour, Sam, and Irving to add $750,000 to the purchase price.

Each of the March, 1975 employment agreements contained "no-compete provisions" which provided:

* * *

> "7. *Restrictive Covenants.* Both parties recognize that the services to be rendered under this Agreement and the knowledge now possessed and to be acquired hereunder by Employee are special, unique, and of extraordinary character. Employer (sic) shall not, for a period of five years subsequent to the date of this Agreement, directly or indirectly, alone, or as

a member of a partnership or as an officer, director, stockholder or investor of or in any other corporation or enterprise (except as an investor in a publicly held corporation listed on a national securities exchange), or otherwise, own, operate, or participate in the ownership or operation of a scrap yard or shredder within Chicago, Illinois or 100 miles of the city limits of Chicago, Illinois, excluding the cities of Milwaukee, Wisconsin and Sterling, Illinois. During such period, Employee shall not communicate or divulge to any person, firm or corporation, either directly or indirectly, any business affairs of Employer, any experience gained by him in the Employer's employ, the names of any of Employer's customers, or any other information not generally available to the public relating to Employer's business affairs or products.

* * *

"9. *Remedy for Breach.* In the event of the breach by Employee of any of the terms and conditions of this Agreement to be performed by him (including, but not limited to, leaving Employer's employment or performing services for any person, firm or corporation engaged in a competing similar line of business with Employer without the written consent of Employer) Employer shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to obtain damages for any breach of this Agreement, and to enjoin him from performing services for any such other person, firm, or corporation in violation of the terms of this Agreement. The remedies provided herein shall be cumulative and in addition to any and all other remedies which Employer may have at law or in equity."

Olfson testified that the parties did not intend paragraph 7 of the employment agreements to amend the profit-sharing agreements. He testified:

Q: I asked you sir, whether or not paragraph 7 was designed by you to amend the profit-sharing plan. Was it?

A: No, it was not.

Several weeks later in mid-May, 1975, the respondents adopted the corporation name of "Pielet Bros. Trading, Inc.," opened its principal offices at DesPlaines, Illinois within Metropolitan Chicago, proceeded to take ten former key employees and twenty-five customers of Pielet Bros., and bought and sold scrap metal in Metropolitan Chicago under the name of Pielet Bros. Trading, Inc. in competition with Pielet Bros.

On June 30, 1976, as indicated, Arthur Pielet, James Pielet, and Robert Pielet, as owners of Pielet Bros., discharged the respondents and, as trustees of the profit-sharing plans, disqualified them from receiving profit-sharing benefits under the several plan agreements.

Respondents sued to recover their profit shares. Petitioners defended against the profit-sharing claims on the grounds of competitive forfeiture and countersued to recover damages, actual and punitive, for respondents' competition forbidden by the March, 1975 employment agreements and for respondents' unfair competition forbidden by common law principles of tort.

The jury and the District Court, on a single interrogatory, construed the restrictive covenant of the March, 1975 employment agreements to permit respondents to compete and extended such construed right to compete to cancel out both the forfeiture provisions of the profit-sharing agreements and the unfair competition counterclaim of the petitioners.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE COURT OF APPEALS IMPROPERLY SANCTIONED THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY INVESTING THE JURY WITH JUDICIAL POWER TO DISPOSE AND RESOLVE ALL FACTS AND LAW AND TO DISPOSE OF THREE TOTALLY DIVERSE CLAIMS BY ITS ANSWER TO ONE SPECIAL INTERROGATORY THAT RELATED TO ONE CLAIM ONLY; AND BY SUCH APPELLATE APPROVAL, DENIED THE PETITIONERS THEIR CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY AND TO DUE PROCESS ON TWO CLAIMS ASSERTED BY THEM.

The issues here are new; the judicial acts of the trial and appellate courts appear to have entered upon maiden judicial territory. The questions of law are of enormous importance and should be settled by this case.

Do constitutional guarantees of due process and trial by jury and established judicial processes empower a court to delegate judicial power to a jury to dispose of all facts and law in three diverse claims upon a single finding of fact reached in one claim only, a claim wholly unrelated to those that remain?

This case involves three claims, one by the respondents and two by the petitioners. Each is separate, each is different, and none are linked by common operative facts or law. Each derives its judicial supporting viability from its own different and separate sources of fact and law.

There is simply no fusion, interdependence, or interrelatedness of these claims where:

1. respondents' claim is based upon two written profit-sharing agreements authored and signed by the respondents themselves as trustees in 1967 and 1969; petitioners defend upon the ground that the plan agreements forbid competition on pain of benefit forfeiture;

2. the petitioners base one claim upon contract and the other upon respondents' tortious conduct. Their contract claim rests upon the March, 1975 employment agreements. The charge is that respondents competed with Pielet Bros. and Joliet Railway in violation of the "no compete" provisions of each of such agreements. The requested relief is compensatory damages;

3. petitioners' second claim rests upon charges that respondents engaged in acts of unfair and dishonest competition with Pielet Bros. and Joliet Railway by unlawfully appropriating the trade name of "Pielet Bros." and raiding its major employees and customers. Punitive and compensatory damages are requested.

No single jury interrogatory nor its special answer is capable of singly and completely disposing of all three such disparate claims without doing violence in the process to constitutional guarantees of due process and trial by jury, to the rule forbidding surrender or abandonment of a client's claim without the client's express consent, and to clear, basic tenets of reason and justice.

The jury's "no" answer to the special interrogatory simply found as a fact that the March, 1975 employment contracts did not forbid respondents from competing with their employer, Pielet Bros., and that their admitted competition did not, therefore, violate such contracts. Petitioners' claim for damages based upon respondents' forbidden competition was, accordingly, resolved against them.

The special verdict on the other hand neither could nor did dispose of petitioners' claim for damages based upon charges that the respondents unfairly competed with Pielet Bros. by misappropriating its trade name and pirating its key employees and customers. The jury's finding of fact that the respondents were free to compete was not a finding that they were free to compete unfairly or dishonestly or fraudulently. Given the jury's finding to permit competition, it does not follow, as the trial court erroneously found, that the unfair use by the respondents of such right was automatically fair and just.

Although invested with wide discretion as to the form and substance of a special interrogatory, all material issues and all causes of action must be covered by the question or questions submitted; otherwise, as here, petitioners' constitutional rights to due process and jury trial would be and were violated (Fifth and Fourteenth Amendments, Constitution of the United States; Seventh Amendment, Constitution of the United States; 25 Wash. U. Law Quarterly, 183, abridged 3 F.R. Service 747.)

Petitioners have been denied jury consideration of record facts showing that the respondents had long before March 22, 1975 plotted to coerce Arthur Pielet into buying their corporate interests; that respondents pretended in January and February of 1975 to explore new southern Illinois business sites for the benefit of Pielet Bros. while secretly planning to acquire these business sites for themselves; that they acquired these sites and business licenses, building permits, and zoning authorizations from a private party on Tuesday, March 25, 1975, one business day after their sale to Arthur Pielet; that within days of receiving $10,000,000, they seized the name of "Pielet Bros.", raided its employees and misappropriated its customers.

Petitioners should have been allowed a jury trial of the issues of unfair competition. The jury's answer to the single interrogatory, judicially applied and adversely extended to dispose of all claims constituted a denial of petitioners' constitutional rights to due process and a jury trial.

The jury's answer to the single interrogatory, judicially applied and extended for the respondents to amend the profit-sharing agreement by eliminating the benefit forfeiture provision for the respondents, also constituted a denial of petitioners' constitutional rights to due process and a jury trial.

II.

THE FEDERAL EMPLOYEES RETIREMENT INCOME SECURITY ACT (29 U.S.C.S. SECTIONS 1104(a) AND 1106(b)(2) PROHIBITS A MAJORITY OF TRUSTEES OF A PROFIT-SHARING TRUST FROM AMENDING TRUST AGREEMENTS TO INVEST THE SAME MAJORITY TRUSTEES WITH PREFERRED RIGHTS TO COMPETE WITH THE FUNDING EMPLOYER COMPANY FREE OF BINDING BENEFIT FORFEITURE UNDER THE TRUST AGREEMENT, RIGHTS PREFERRED AND RESERVED TO THESE TRUSTEES ALONE AND RIGHTS, THE EXERCISE OF WHICH WOULD DISCRIMINATE AGAINST THE BENEFIT INTERESTS OF THE REMAINING EMPLOYEE BENEFICIARIES.

This issue, too, involves an important question of law which, to petitioners' knowledge, has not been, but should be, settled by this case. Case law appears to deal almost exclusively with plan fiduciaries' misconduct consisting of misappropriation or misuses, directly or indirectly, of the assets of profit-sharing trusts; none involve the misconduct of plan trustees who preferentially reserve to themselves, as in the case at bar, the right to freely

compete with the funding employer in the same line of business.

The jury's "no" answer to the special interrogatory was applied and extended to amend the profit-sharing agreements by specially eliminating their forfeiture provisions as to the respondents. Preferential rights were thereby created which were adverse to the interests of the plan and to the interests of the participants or beneficiaries. Moreover, such fiduciary conduct was not a discharge of duties with respect to the plan that could be considered solely in the interests of the participants and beneficiaries.

The relevant provisions of the Employees Retirement Security Income Act are Sections 1104(a) and 1106(b)(2). Section 1104(a) provides:

> "* * * a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries * * *."

Section 1106(b)(2) provides:

> "Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—
>
> * * *
>
> "2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries * * *."

Where, as here, the jury's finding of respondents' right to compete is enlarged to amend the profit-sharing agreements by broadening such right to become free of benefit forfeiture as required by the profit-sharing agreements, such amendatory action shall fail as a preferred grant of valuable and protected rights to the plan trustees, as fiduciary rights not given to other plan bene-

ficiaries. Such grants of preferred rights and benefits squarely conflict with Section 1104(a) of the Federal Pension Reform Act which insist that plan fiduciaries discharge their duties "solely in the interests of the participants and beneficiaries."

Moreover, this amendatory action of the plan trustees discriminates against the remaining plan beneficiaries by investing such trustees with rights of competition that are reasonably certain to reduce company profits and correspondingly to reduce the company's plan contributions, lessening thereby the respective interests of each of the plan beneficiaries. Clearly, this amendatory action is contrary to Section 1106(b)(2) which forbids transactions with the plan which are "adverse to the plan or the interests of the participants or beneficiaries."

CONCLUSION

For the foregoing reasons, the petitioners pray that this Court grant their Petition for Writ of Certiorari and, upon review, reverse the Court of Appeals' decision, and remand with directions to enter judgment for the petitioners upon (i) respondents' Amended Complaint; (ii) petitioners' counterclaim for breach of the "no compete" provisions of the employment contracts of March 22, 1975; and to grant (iii) a new trial on issues of respondents' liability upon counterclaim charges of unfair competition.

Respectfully submitted,

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November 11, 1982